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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

v.

ROSEMARY AUGUST,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE

Interest of the Amicus*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members dedicated to protecting the

* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

fundamental rights of the people of the United States. When an individual's rights are violated, the ACLU often provides legal representation through volunteer cooperating attorneys who litigate on behalf of the people to restore their rights and to obtain remedies for the violation thereof. Because the decision in this case will have a considerable impact upon the ability of civil rights plaintiffs to seek vindication of their rights through litigation, the ACLU, amicus curiae, submits this brief.

Rule 68 of the Federal Rules of Civil Procedure permits a party defending a claim to make an offer to allow judgment to be taken against him in a certain amount, together with the costs then accrued, at any time more than 10 days before the trial begins. If the offer is rejected and the offeree recovers less than the amount offered,

the offeree must pay the costs incurred after the making of the offer.

At issue in this case is whether Rule 68 can be invoked at all where a plaintiff ultimately does not win at all. Also at issue is whether a bad faith or unreasonable offer is sufficient to invoke Rule 68. Stated otherwise, does Rule 68 require a defense offer to be reasonable? Here, where the defendant-employer, now petitioner, parsimoniously offered only $450 to settle a claim requesting reinstatement and $20,000 in back pay, both lower courts held that the offer was unreasonable and that Rule 68 thus could not be invoked. The ACLU, amicus curiae, agrees with the decisions of the courts below, and accordingly supports the position of the respondent here.

In this brief, amicus addresses another issue not directly before the Court:

whether, assuming arguendo the applicability of Rule 68, the "costs" allowed a defendant under Rule 68 include attorney's fees. We submit that attorney's fees are not and should not be included in Rule 68 defense costs.

SUMMARY OF ARGUMENT

Addressing the Rule 68 issues in this case, the Seventh Circuit below commented on the "high objective" of Title VII's attorney's fees provision, 42 U.S.C. §2000e-5(k), as an argument against a "technical interpretation" of Rule 68. August v. Delta Air Lines, Inc., 600 F.2d 699, 701 (7th Cir. 1979). The court of appeals' reference is a curious one because nothing in the court's opinion or in the facts suggests that the defendant-employer's attorney's fees were at issue under Rule 68. Nonetheless, because amicus believes that any

assumption that Rule 68 costs could include attorney's fees is unwarranted and contrary to the language and congressional intent behind civil rights fee-shifting legislation amicus urges recognition of the fact that defense costs under Rule 68 do not include attorney's fees.

Whenever a civil rights plaintiff prevails, by vindicating rights or by obtaining some of the benefit sought in filing suit, it is now well settled that the plaintiff is entitled to fees almost "as a matter of course." See, e.g., Gates v. Collier, 616 F.2d 1268, 1275 (5th Cir. 1980); Davis v. Murphy, 587 F.2d 362, 364 (7th Cir. 1978); see also, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978); Northcross v. Board of Education of Memphis, 412 U.S. 427, 428 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Since these standards are fully applicable

to a plaintiff who settles, Maher v. Gagne, 48 U.S.L.W. 4891, 4893 (U.S. June 25, 1980), any offer of judgment to a plaintiff under Rule 68 should include an offer of fees. In any event, once plaintiff accepts an offer, that plaintiff would be entitled to fees under a fee-shifting statute. Consistently, Rule 68 recognizes that "the amount or extent of liability" often "remains to be determined by further proceedings."[1/]

1/ A defendant's fee liability, as determined by further proceedings, flows from the judgment and is thus unaffected procedurally by timing requirements of the Federal Rules of Civil Procedure or of local court rules. This much was firmly established long ago by this Court in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). There, the Court held, an application for fees is not governed by the then-existing version of Rule 59(e) concerning motions to alter or amend judgments since such an application simply is "not a request for a modification of the original decree." 307 U.S. at 170. This is because, to the extent that the amount of the fees is not determined in the decree on liability, the fee award then must be resolved in "an independent

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At the same time that a Rule 68 offer of judgment should include an award of fees, Rule 68's allowance of "costs" to a defendant whose reasonable offer was more than the plaintiff ultimately won does not include attorney's fees.

First, the accepted meaning of "costs," particularly as used in the Federal Rules of Civil Procedure and elsewhere, does not include fees. This understanding was made unassailable last Term in Roadway Express, Inc., v. Piper, 48 U.S.L.W. 4836 (U.S. June 23, 1980), where this Court held that the word "costs" as used in 28 U.S.C. §1927 does not include fees.

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proceeding supplemental to the original proceeding." Id. For the same reasons, fee applications are not necessarily governed by local court rules concerning the timing for bills of costs, for the considerations involved in determining fee awards are not of a routine character like ordinary taxable costs." 307 U.S. at 168.

Second, in enacting civil rights fee-shifting legislation, Congress never has explicitly or even implicitly amended Rule 68. Quite to the contrary, Congress directed, when it enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 as amended, that prevailing plaintiffs "should ordinarily recover an attorney's fee" even when they merely "vindicate rights through a consent judgment or without formally obtaining relief," whereas a defendant can recover fees only when the plaintiff is "shown to have litigated in 'bad faith.'" S. Rep. No. 94-1011, 94th Cong., 2d Sess., 4-5 (1976); see also, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 6-7 (1976). A nearly identical dual standard governs fee awards under Title VII, Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). To hold that Rule 68 costs could include a defendant's fees as a matter of course would wholly

violate the congressional purposes and intent behind all civil rights fee-shifting legislation.

ARGUMENT

ANY ALLOWANCE OF "COSTS" TO A DEFENDANT, AS THE WORD IS USED IN RULE 68, DOES NOT INCLUDE ENTITLEMENT TO ATTORNEY'S FEES

I. The Accepted Meaning of the Word "Costs" Does Not Include Attorney's Fees

Any question about the meaning of "costs" in Rule 68 is largely resolved by this Court' recent opinion in Roadway Express, Inc. v. Piper, 48 U.S.L.W. 4836 (U.S. June 23, 1980), which held, inter alia, that the word "costs" as used in 28 U.S.C. §1927 does not include attorney's fees. The Court found that §1927, which allows a court to tax costs against an attorney who behaves "unreasonably" or

"vexatiously," should be read together with 28 U.S.C. §1920, since both derived from the Fee Bill of 1853. As such, §1920--and thus §1927--limits taxable costs to clerks' and marshals' fees, court reporter charges, printing and witness fees, copying costs, interpreting costs, and the fees of court-appointed experts, but does not allow attorney's fees.[2/] Moreover, the Court found that the "contemporaneous understanding" of the term costs at the time that §1927's predecessor was first enacted (in the year 1813) excluded attorney's fees and, in fact, the "American rule" has continued to be that attorney's fees are ordinarily not recoverable as costs. 48 U.S.L.W. at 4836; see also, Fleischmann Corp. v. Maier Brewing,

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[2/] 28 U.S.C. §1920 does allow "attorney's docket fees," by reference to 28 U.S.C. §1923, but these of course are quite distinct from attorney's fees themselves.

386 U.S. 714, 717-718 (1967). Finally, the Court in Roadway Express found that the civi rights fee-shifting statutes,[3/] which allow attorney's fees "as part of the costs," did not amend the meaning of costs in 28 U.S.C. §1927.

The meaning of "costs" as used in Rule 68 of the Federal Rules of Civil Procedure is similarly limited to taxable costs. The "contemporaneous understanding" of costs when the Rules were promulgated in 1938 did not include attorney's fees any more than it did in 1813. See Fleischmann v. Maier

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[3/] Roadway Express involved the attorney's fee provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 e-5(k), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, both of which provide in part that "the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs." Substantially identical provisions are found in Title II of the 1964 Civil Rights Act, 42 U.S.C. §2000 a-3(b); the Civil Rights Act of 1968, 42 U.S.C. §3612(c); the Equal Employment Opportunity Amendment of 1972, 42 U.S.C.

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Brewing, 386 U.S. 714, 717-718 (1967). The brief legislative history of Rule 68 found in the Advisory Committee Notes to Rule 68 similarly indicates no intent to deviate from the common meaning of costs.

In an analogous situation, two courts of appeals recently decided that "costs," as used in Rule 39 of the Federal Rules of Appellate Procedure, do not include attorney's fees. Vasquez v. Flemming, 617 F.2d 334 (3rd Cir. 1980); Davis v. Murphy, 587 F.2d 362 (7th Cir. 1978). The contention that appellate costs should include fees arguably is much stronger than same argument

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§2000 e-16(b); and the Voting Rights Act Extension of 1975, 42 U.S.C. §1973 l(e). In general, these provisions are construed interchangeably. Roadway Express, Inc. v. Piper, 48 U.S.L.W. 4836, 4838 n.5 (U.S. June 23, 1980); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

with respect to Rule 68, since the Federal Rules of Appellate Procedure were adopted in 1967 after the civil rights attorney's fees provisions were enacted in the Civil Rights Act of 1964. Yet both courts which considered the question rejected the argument summarily, holding that the word "costs" as used in the Rules is limited to the traditional definition.

Finally, when the authors of the Federal Rules intended that attorney's fees be recoverable, they were specifically mentioned, as in Rule 37 of the Federal Rules of Civil Procedure which allows "reasonable expenses...including attorney's fees" (emphasis added) as discovery sanctions. Since Rule 68 does not also explicitly include attorney's fees, they simply are not allowable thereunder as a part of defense costs.

II. The Civil Rights Fee-Shifting Statutes Did Not Amend the Meaning of "Costs" in Rule 68

Since Rule 68's reference to costs literally does not include attorney's fees, any argument that such costs do include or affect attorney's fees must turn on the proposition that Congress' enactment of fee-shifting legislation amended Rule 68 sub silentio when it made attorney's fees recoverable "as part of the costs." See, e.g., Waters v. Heublein, Inc., 485 F.Supp. 110, 114 (N.D. Cal. 1979), where the trial court held that a Rule 68 offer, which turned out to be more than the plaintiff ultimately recovered, precluded an award of attorney's fees to the prevailing plaintiff for all time expended by plaintiff's lawyers after the date of the offer.

The problem with this argument is that the identical argument was rejected, with

regard to 28 U.S.C. §1927, by this Court in Roadway Express, Inc. v. Piper, 48 U.S.L.W. 4836 (U.S. June 23, 1980). It also should be rejected here, with regard to Rule 68, for three reasons.

A. There is no evidence of any congressional intent to alter the meaning of costs in Rule 68

Nothing in the fee-shifting statutes or their legislative history suggests that Congress intended to amend Rule 68 by incorporating attorney's fees into costs. Recognition of this fact flows directly from the examination made in the decision by this Court in Roadway Express, Inc. v. Piper, supra.

It of course remains true that fee-shifting provisions such as those in 42 U.S.C. §1988 and in Title VII do authorize fee awards as a part of the costs. But,

as this Court found in Roadway Express, Inc. v. Piper, supra, the manner in which Congress chose to authorize fees is irrelevant here. This is so because, as the Fifth Circuit recently concluded after examining the extensive legislative history of 42 U.S.C. §1988, fees were authorized as part of costs "for one reason and one reason only: to ensure that the Eleventh Amendment is no bar so that these fees are recoverable against government officials acting in their official capacity." Gates v. Collier, 616 F.2d 1268, 1276 (5th Cir. 1980). See also, Hutto v. Finney, 437 U.S. 678, 695 (1978).

Congress of course at any time could amend the list of taxable costs specified in 28 U.S.C. §1920. In fact, Congress recently did amend the §1920 definition of taxable costs to include fees of court-appointed interpreters and expert witnesses when it passed the Court Interpreters Act,

Pub.L. No. 95-939, codified primarily in 28 U.S.C. §§1827-1828. Congress did not similarly amend §1920 to include attorney's fees, nor has it done so in enacting the civil rights fee-shifting statues. In other words, Congress has never yet used the civil rights fee-shifting statutes to affect the ordinary meaning of costs.

B. Even though attorney's fees are generally authorized "as part of the costs," they are treated as distinct from ordinary costs for most substantive purposes

As a practical matter, attorney's fees under all fee-shifting statutes are not treated as costs for most other purposes. The standards for taxing costs and for awarding attorney's fees are quite different. Under Rule 54(d), costs are allowed "as of course to the prevailing party," whether

plaintiff or defendant. Under civil rights fee-shifting statutes, on the other hand, fees are ordinarily awarded to prevailing plaintiffs "unless special circumstances would render such an award unjust," Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), but to prevailing defendants only where the plaintiffs' action was brought in bad faith or is "found to be unreasonable, frivolous, meritless or vexatious." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978). Thus, particularly with regard to prevailing defendants, the standards for taxing costs are quite different from the standards for awarding fees.

Additionally, the method for taxing costs differs considerably from the complications involved in determining a reasonable award of fees. Under Rule 54(d), costs may be taxed by the clerk of court on one days'

notice. Attorney's fees, however, can be awarded only by a "court." See, e.g., 42 U.S.C. §1988; Robinson v. Kimbrough, 620 F.2d 468, 473 (5th Cir. 1980). And, in determining the amount of fees, courts must consider an intricate set of standards before making the award. See, e.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (1974), which sets forth 12 factors to be considered in setting reasonable fees; see also, Lindsay Brothers Builders, Inc., v American Radiator & Standard Sanitary Corp. 540 F.2d 103 (3d Cir. 1976), which explains the various factors to be considered under the lodestar method of fee computation.

Both the dual standard for awarding fees and the methodology to be used by the courts to calculate reasonable fee awards form a considerable part of the legislative history of 42 U.S.C. §1988. See particularly, S.Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess.,

8-9 (1976). Quite evidently, Congress did not intend fees to be treated as akin to costs.

C. Allowing Rule 68 offers to affect attorney's fees would substantially undermine the congressional purpose behind both Rule 68 and the civil rights fee-shifting statute

Rule 68 was intended to provide a modest incentive to settle litigation by making a plaintiff who refused a reasonable offer and who thereafter recovered less than the offer to bear the costs incurred by both parties after the date of the offer. These costs, limited to the accepted notions of taxable costs, are normally small compared to the total expense of litigation. Traditionally, recoverable costs have included clerk's and marshal's fees, costs of necessary transcripts and printing, witness fees, docket

fees, and the like. 28 U.S.C. §1920. Not included are attorney's fees. Yet, even with fees being treated quite separate from costs, taxable costs are sufficiently substantial to the extent that shifting them can provide a strong incentive for accepting reasonable Rule 68 offers.

The attorney's fees awarded in civil rights litigation, similar to yet ordinarily less than the fee awards in securities and antitrust litigation, are altogether different from costs. Not only are fee awards considerably larger than the taxable costs allowable,[4/] but the purposes of fee awards are altogether different from those of Rule 68 cost-shifting.

4/ This fact is derived in part from the congressional intent that counsel be adequately compensated for all time reasonably expended on a matter, and that the award not be reduced because the rights involved may be nonpecuniary in nature, S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976).

As this Court has repeatedly recognized, attorney's fees are awarded in civil rights cases to vindicate "a policy that Congress considered of the highest priority." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Private plaintiffs are Congress' chosen instrument to enforce many of the nation's civil rights laws. In enacting these statutes, Congress has repeatedly stressed the importance of "private attorneys general," and the necessity of attorney's fees so that plaintiffs--whatever their means--are not deterred from securing their statutory and constitutional civil rights. See generally, S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976).

The importance of the civil rights fee-shifting statutes is highlighted by the interpretation they have received from this Court. Although the statutes usually declare that

"the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee," it has been held that, to effectuate Congress' aims, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 390, 402 (1968)(emphasis added). Lower courts have interpreted this to mean that fees should be awarded to prevailing plaintiff's "as a matter of course." See, e.g., Gates v. Collier, 616 F.2d 1268, 1275 (5th Cir. 1980), and cases cited therein. Moreover, a plaintiff need not win on every issue to be a "prevailing" party, and there need not be a final judgment. See, e.g., Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Brown v. Culpepper, 559 F.2d 275 (5th Cir. 1977).

"The full effectuation of the nation's civil rights policy would be seriously undermined if congressionally authorized fees

could be held hostage to Rule 68 offers. This concern was one basis for the Seventh Circuit's holding below that there is a good faith requirement in Rule 68. But the court below erred in assuming that the defendant's attorney's fees might have been shifted by the Rule 68 offer.

If potential plaintiffs--particularly their attorneys--know they may be unable to recover fees, even though the plaintiffs ultimately may become the prevailing parties, they no doubt will pursue their rights less often, if at all. Yet, in enacting the Civil Rights Attorney's Fees Awards Act in 1976, 42 U.S.C. 1988, Congress recognized that earlier fee shifting provisions had been successful in enabling "vigorous enforcement of modern civil rights legislation." S. Rep. No. 94-1011, 94th Cong., 2d Sess., 4 (1976) (emphasis added). The purpose of 42 U.S.C. §1988 is the same. It is designed to extend

that "vigorous enforcement" to civil rights statutes which did not have their own fee-shifting provisions. This Court should not allow this policy of vigorous enforcement to be undermined by making attorney's fees taxable as Rule 68 costs.

CONCLUSION

Amicus agrees with respondent's reasoned argument that Rule 68 applies only where an offeree wins something that is less than the offeror's offer; and that, even there, Rule 68 cannot be invoked unless the offer is reasonable. Accordingly, amicus urges affirmance of the decision below.

Amicus also submits, however, that the word "costs" in Rule 68 does not and cannot include attorney's fees. For the foregoing reasons, amicus requests this Court to

recognize that Rule 68 has no effect on fee awards or on the standards designed by Congress for civil rights fee-shifting statutes.

Dated: September 15, 1980
New York, New York

Respectfully submitted,

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